Marquette Law Review

Volume 8
Issue 2 *February 1924*

Article 3

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TROUBLES OF THE MEDICAL WITNESS

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The two most noble professions entrusted to human hands: viz, the legal and medical, to a superficial view are entirely distinct and yet are closely united by a common bond in one aim. The medical man's purpose is to alleviate physical suffering while that of the lawyer is to secure justice for those injured in their rights. Both aim to uphold public morals and welfare, and not one individual member can escape the moral obligation which rests upon him as a consequence of his choice of his profession as a means of a livelihood.

These two professions do not seem to understand each other in their work to help their fellow man, or possibly the method employed is at fault. Expert medical testimony was primarily regarded with great respect and looked upon as the scientific conclusions of one well qualified to give these by impartially interpreting the facts presented.

A great change has gradually taken place which has resulted in anything but an enviable reputation for the medical expert. Many reasons might be given for this change. At the present time, no matter how learned or honest a medical witness may be, he is no longer able to speak with the voice of the whole profession relative to the many phases that this field involves. The collateral sciences now applied to the elucidation of medical-legal problems in a given case often require an expert in a limited field to arrive at a logical scientific conclusion.

An attempt is often made on the part of the medical witness to rise to a situation for which he is not prepared, with the result, naturally to be expected, that his conclusions, though honest, lead to the disrepute and discredit into which medical testimony has gradually fallen. If supported by scientific research and free from personal bias, medical testimony should occupy, in my humble mind, a position of weight and decisiveness similar to that of a judicial opinion where a medical question is involved. The witness is called upon to assist the Court in forming a judgment, in determining disputed questions of fact in cases of life and death where scientific experience, knowledge and skill, not possessed by judges or counsel, are necessary

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for determination and for which this witness is peculiarly prepared. Therefore, his position might be considered partly judicial, passing upon facts by the presentation of his conclusions which neither the Court, the counsel nor the jury could be expected to understand without this special aid.

The duties of the medical witness are, therefore, of a highly responsible nature and the privileges extended to this witness testifying as to opinion as well as facts should be appreciated and great care should be observed that this privilege is not overstepped. I realize it is difficult for a lawyer to fully understand the position of a medical witness for the reason that a physician's chief concern as a practitioner is to relieve suffering humanity and the saving of human life, while as a witness he must select by observation such data, whether with reference to living or dead, as will aid the Court in fixing responsibility, either criminal or civil, and in avoiding conviction of one falsely charged with crime.

There are many questions to the legal aspect of the situation. For example, the precise character of the wound, in what manner inflicted, whether self inflicted, whether by a blunt or sharp instrument, are not essential to good surgical treatment and to the attending physician are entirely superfluous. Conditions that may exist go unobserved and as a witness a new viewpoint must be taken by the physician. He must make use of such principles as bear upon legal proof. He must mould these principles and his conclusions to suit the purpose of the law. It will thus readily be seen that something more than a medical knowledge is required. A new point of view must be taken, for unless the witness has in mind the elucidation of points peculiar to the legal aspect, his testimony may be valueless in aiding a court of justice in fixing legal responsibility.

It must not be supposed that the success of a medical witness and his usefulness to a Court and jury depend upon the profoundness of his medical knowledge. There is perhaps no field in which so frequently a man with a very brilliant educational qualification can make so lamentable a failure. The reasons for failure of many physicians well qualified in a medical way to become thoroughly competent medical witnesses are many, but perhaps the most outstanding are—first, a lack of preparedness upon the particular questions involved, and second,

treatment at the hands of counsel while under cross examination. I will attempt to outline here some of the hazards and pitfalls that a medical witness must avoid in order to be successful.

The medical witness to be effective must be one who has given much thought to the observation of any and all the circumstances that may have bearing upon the medical legal testimony. Circumstances often escape the attention of one untrained in this method of observation which would be considered of prime importance by the trained observer. Indications which appear trivial to the average practitioner remain unrecorded and may later be found to be of great importance and not have been observed at the time of investigation, and it will often for this reason be impossible to answer material questions bearing on the case which may arise during the progress of its development.

It is not to be presumed that the non-observance of material facts is due to professional ignorance or intentional negligence, but rather to a lack of necessary training in the requirements of medical testimony. In other words, the witness must see everything and be able to select from the mass of evidence such points as might by any possibility have a bearing on the case at issue.

It is rarely possible for a medical witness to testify with justice to himself without proper preparation, even though he be unquestionably competent in practicing his profession. The competent treatment of disease or injury and the answering of academic questions relating thereto are widely separated subjects. Opposing counsel may propound a hypothetical question which the physician could readily cope with in actual practice but which he could not be expected to answer offhand. Counsel can easily see this situation and make it appear to the jury that the witness is incompetent. The possibility of the occurrence of this situation deters many physicians from testifying in a professional way in our courts, and I regret that the curricula of our medical schools do not provide proper training for students regarding what may be expected of them on the witness stand. If the witness is possessed of a knowledge of court procedure in medical cases and has ample time, there is no excuse for not being properly prepared. The conscientious physician should, therefore, be reluctant to testify

in any case without sufficient time for proper preparation, for all too frequently he is persuaded to render an opinion which he might not support had he time for careful consideration.

It is generally taken for granted by the layman that the medical man is above the possibility of an error, and I should be almost tempted to believe it if I were not myself a physician and know it is human to err. Errors of judgment, errors of observation are common to all walks of life. A true, thorough appreciation of this truth is the means of avoiding or rectifying many mistakes that otherwise would be sure to occur.

A medical witness must be careful to keep a close check upon his observations and judgment. These errors will progressively diminish in number as he gains in experience. A faulty recollection of circumstances or facts should impress upon the witness the importance of keeping careful notes on all facts which he may observe with reference to any case which may become the subject of legal investigation or controversy. Not only must he record his observations concerning facts but must just as carefully note incidents and manifestations which to all but the trained observer would appear trivial.

The knowledge of the possibility of faulty impressions and illusions of observations should make for more accurate data and the replacement of relative terms by accurate measurement with the use of terms in descriptions that can have but one meaning. It is not descriptive to say that an organ is very large because such a term may have a very varied interpretation. One must give accurate dimensions. Its relative size to the normal organ counsel can easily understand when dimensions are given. So all along the line, the methods of recording must convey as near as possible a description of existing conditions. Then, whatever error may result will be from conclusions and not from recording facts.

One of the most fatal errors into which the medical investigator can fall is the attempt to preconceive theory. This attempt invariably leads to the failure to search for and observe indications which might possibly lead to conclusions entirely at variance with the results that might be expected from the history of the case. It is the medical witness' duty to observe and record all data that may be adduced from the subject at

hand, and conclusions formed prior to a careful investigation cannot help but fail and have incomplete results.

One of the greatest difficulties encountered by the medical witness, and especially one of but limited experience is the careful differentiation between the conclusions he arrives at from the observation of the facts and the moral or sentimental effect which such testimony will have. It is strictly outside of the witness' province to allow his expressed conclusions to be warped by the effect such testimony might have on the outcome of the case but he must remember that he is testifying as to facts observed and only to such conclusions as justly and without reasonable doubt would naturally be built up upon his observations. Nevertheless, when the expression of opinion by the medical witness has a grave bearing on the outcome of a case in which the results are of serious or perhaps fatal consequence to the person or persons concerned, extreme caution and ultra-careful consideration are demanded.

The witness must ever be careful to separate facts and conclusions necessarily built thereon from mere suppositions and tentative opinions. It is due to the Court, as a basis for correct judgment, and to the parties involved, that the witness express only well grounded conclusions, and if opinions are expressed they should be designated as such and their weight or bearing on the case conveyed by the witness in such a manner as to leave no doubt of their importance or lack of it.

It is also important that the witness not only convey his conclusions to the Court and jury in such manner and language as to leave no doubt of their meaning, but he must endeavor to impart a true appreciation of the relative importance and certainty of the various portions of his testimony. In this manner he avoids the frequent error of attaching too much weight to trivial matters while the weightier ones go comparatively unobserved. In technical matters both Court and jury are largely dependent upon the efficiency of the witness, and if he be of but doubtful competence or veracity, the result often is that a cloud is cast upon the whole of his testimony. However, in spite of all care, errors of judgment will occasionally creep in. Perhaps almost all of these errors are due to insufficient or incorrect data or to preconceived theories entertained prior to thorough investigation.

There are also errors of judgment resulting from human falli-

bility, as from the espousing of certain schools of thought. These various systems differ on more or less important points and it is quite evident that all of them cannot be correct. In conclusion on this point it might be stated that while it is incumbent on the witness to use due and proper care in the formulating of his conclusions (and there is no doubt whatever that the conscientious witness more than meets these requirements), he is not expected to guarantee the absolute accuracy of his expressed judgment.

In preparing his testimony the medical witness must not forget that it is not humanly possible to give detailed particulars regarding all of his investigations or the precise manner and methods he employed in arriving at his conclusions. Such a recital would be meaningless verbiage to all but the medical profession. He is under necessity, however, of conveying the import of his conclusions in such a manner and in such order that a proper and well balanced conception is imparted to his audience.

The witness must always be prepared to give reasons for all opinions expressed, and should never be allowed to have doubts upon certain points to be grudgingly admitted under cross examination by opposing counsel. If a doubt exists he should freely and cheerfully admit it, not forgetting (if his conclusions are sound) that these uncertainties will not change them. It is not advisable or profitable to argue with counsel while on the stand. There is nothing to be gained thereby, and the witness is placed in the position of defending his personal veracity or skill (at least it appears so to the jury), and these are not the points at issue.

A point about which there is general misinformation is the common notion that it is possible to express medical information only in the most technical and unintelligible terms. Nothing could be further from the truth. If one understands the proper meaning of a technical term he would prefer to apply to specific use, he will have no difficulty in interpreting it in such language as will be perfectly comprehensible to all who are capable of grasping the idea it is intended to convey. It is to be understood, of course, that the paraphrasing of technical language and the employment of words in more or less common use will make explanations more lengthy; but this time is more than saved by the advantage gained in conveying infor-

mation or opinions in unmistakable terms and avoiding misconceptions and explanations that might easily result from the use of terms which often have a much narrower and specific meaning when employed in a technical way than the same words have when used in the ordinary language.

The answers of the witness must be confined to the questions asked and no attempt must be made to supply gratuitous information upon subjects not intimately connected therewith. Neither must any attempt be made to evade the answering of questions. If the Court rules that the question is a proper one, and the witness can answer it, it can serve no useful purpose to attempt to evade it. By inference the very impression which the witness apparently seeks to avoid will be conveyed by his reluctance; and the Court and jury naturally would be expected to put an unfavorable construction upon the incident.

The medical witness must ever bear in mind that rash or ill-considered statements will most certainly involve him in a dilemma from which it may be impossible to extricate himself. Neither will evasive and technical expressions with intent to conceal misinformation, or lack of information, avail the witness. Opposing counsel is not slow to discover the motive actuating such camouflage, and will no doubt check up the witness' statements; and if the physician is endeavoring to cover up some flaw in his testimony by ultra-technical language or meaningless phrases, it will no doubt be discovered.

There are good and bad witnesses in all walks of life, but there are no grounds for entertaining the opinion that the medical witness is any worse than others. It is to be regretted that some attorneys see fit to attempt to minimize the importance of the witness's testimony by unjust attacks upon his competence or veracity. This brow-beating is often undertaken with a view to distract the attention of the Court and jury from the significance of the testimony given and to divert the attention to some other and inconsequential matter. The limit placed on the manner of stimulating the witness to anger and possibly rash statements is largely within the discretion of the Court, and it is but fair to say that this practice is more frequently frowned upon.

In circumstances where a "Yes" or "No" answer is demanded of the witness, and such an answer would be misleading, it has been my custom to answer "Yes" or "No." Such an answer de-

mands an explanation and gives the witness an opportunity to amplify the subject.

It is a matter of some concern to the conscientious physician as to how much he should allow himself to be influenced by the side of the case upon which he is retained. In my opinion it is the duty of medical counsel to give as favorable an interpretation to the facts observed as a strict adherence to the truth will permit, but to go no further and not under any circumstances to allow himself to be tempted to disregard unavoidable conclusions, even though unfavorable, in an effort to establish a case to suit the wish of a client. It is also the duty of the medical counsel to be on the lookout and to controvert any statements made by opposing parties with the intent of adding to, detracting from, or perverting a just and fair conclusion. With the performance of these duties the responsibility of the witness ends.

There is a certain kind of witness who deserves mention here—the man of attainments in an oratorical way, who possesses the art of making black look white, and even though unintentionally, impresses the jury to a much greater extent than the merits of his arguments would warrant. When such a man is possessed of a thorough training and is indeed scrupulous in his adherence to the truth, he is indeed a valuable witness. The witness most to be guarded against, however, is the witness of unquestioned knowledge and attainments who is unscrupulous enough to sell his abilities to the highest bidder. It is hard to successfully rebut such a witness, for the reason that he decides upon the favorable conclusions first, and then fits his statement of the facts to substantiate it. Were it not for the fact that almost invariably some trivial but patent truth escapes his attention and thus upsets his otherwise well-constructed argument, the case would be well-nigh hopeless. However, such perverting of attainments to unworthy ends is eventually discovered and the medical witness who has lost the confidence of Court and jury through deliberate misrepresentation is indeed unfortunate.

It is against this class of witness that some concerted action should be taken by both the medical and legal professions. These men, fortunately, are but few as compared with the large number of medical witnesses constantly in the field. They are, however, readily detected after a short review of their career in the courts as witnesses, building up for themselves

stigmata that are as recognizable in their fitness, and their reward is usually that to be expected, that is, the voiced condemnation of both the legal and medical professions, eventually only being employed in a case where the result desired to be accomplished requires a questionable method of procedure.

As a suggestion in correction of the inclination to color the findings, either consciously or unconsciously, some new method of selecting the medical witness, whereby he will not be placed on one side or the other, but shall be oppointed as an independent medical jury, having an impartial interest in the outcome of the case. I understand much consideration has of late been given to the advisability of appointing what might be termed a medical commission on a given case, interested only in discovering the truth as opposed to two or more medical witnesses on either side who may for some known or unknown reason hold opinions diametrically opposite or at least at great variance with each other. While this is especially true in civil cases, criminal cases are not without illustration.

Our present system of selecting or appointing medical witnesses certainly gives opportunity for one of the greatest defects in medical testimony, and one that has led in a great degree to the present state of disrepute and mistrust in which this form of evidence is now held, that is, lending complexion to the testimony because of being lined up with one side or the other. This influence which may act unconsciously and probably with varying degree in different individuals is the greatest temptation and pitfall into which the witness falls.

The solution of this problem presents itself to the courts that are daily meting out justice to those who are accused of crime. There seems to be no trouble where the accused is mentally deficient. Courts have the power to appoint a commission to examine the accused. Whether this method would apply to others accused of crime, or in civil controversies, I do not presume to assert, but some modification of the present method of selecting medical witnesses to obtain best results and further the ends of justice should occupy the consideration of those acting in authority.[1]

[1] See also article "Physician as an Expert Witness," 1 MARQUETTE LAW REVIEW 100.—Ed.